TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 250.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA AND WILLIAM MAYGER, APPELLANTS,

vs.

THE MONTANA MINING COMPANY, LIMITED.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 4, 1902.

(18,882.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1903.

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Appellants,
vs.
THE MONTANA MINING COMPANY, LIMITED, Appellee.
} No. 714.

Transcript of Record.

Appeal from the circuit court of the United States for the district of Montana.

1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Defendants.

Caption.

Be it remembered, that on the 16th day of November, 1893, the plaintiff filed its bill of complaint herein, which is entered of final record, and being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Defendants.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the ninth circuit, district of Montana:

2 The Montana Mining Company, Limited, a corporation organized under and pursuant to an act of the Kingdom of Great Britain, brings this its bill of complaint against The St. Louis Mining and Milling Company of Montana and against William Mayger, defendants. And thereupon your orator complains and says:

I.

That at the dates and times hereinafter mentioned your orator was and now is a corporation duly organized and existing under and by the laws of the Kingdom of Great Britain, and is and was a resident of said kingdom, and that the above-named defendant, The St. Louis Mining and Milling Company of Montana, was at all of said dates and yet is a corporation duly organized and existing by and under the laws of the State of Montana, and that the above-named defendant, William Mayger, was at all of said times and yet is a citizen of said State of Montana, and a resident thereof, and that the complainant and the said defendants are not residents of the same State.

II.

Your orator further complains and says that at the dates and times hereinafter mentioned and for a long time prior thereto, your orator was the owner of, entitled to, and in the actual possession, use, and enjoyment of all and singular that certain quartz lode mining claim situate and being in Ottowa unorganized mining district, in the county of Lewis and Clarke, State of Montana, com-
3 monly known and called the Nine Hour Lode mining claim, the same being more particularly described in the United States patent therefor, as being lot number 63, embracing a portion of township number eleven, north of range six west, in the district and county aforesaid; that as the owner of said lode mining claim your orator is entitled to all veins, lodes, and ledges, within the surface boundaries of the said mining claim and of all metals, ores, quartz and other rock therein contained; that the said mining claim is of great value, to wit, it is of the value of more than ten thousand dollars, and your orator is the owner of said mining claim in fee simple absolute, holding the same under a patent from the United States issued to its predecessors in interest.

III.

Your orator further complains and says, that notwithstanding it is so, the owner of the Nine Hour Lode mining claim, and of all quartz, rock, ore, mineral, gold, silver and other precious metals therein contained, the said defendants have wrongfully and without the consent of your orator, on or about the 10th day of November, 1893, entered upon a portion of the said Nine Hour Lode mining claim by means of a certain tunnel, commonly known as the Transcontinental tunnel, which said tunnel has been started upon the mining claim of the above-named defendant, The St. Louis Mining and Milling Company, of Montana, which adjoins the claim of your said orator on the west; that said tunnel of said defendants was commenced at a point on the said St. Louis Lode mining
4 claim, from which corner No. 2 thereof bears south 26° 7′ east, and distant 541½ feet, and the said tunnel runs thence south 19° 22′ east, 80.83 feet; thence south 13° 6′ east, 81.03 feet;

thence south 18° 4′ east, 70.55 feet; thence south 37° 4′ east, 34.56 feet; thence south 25° 30′ east, 25.24 feet; thence south 24° 38′, 90.40 feet; thence south 21° 27′ east, 37.37 feet; thence south 24° 23′ east, 44.50 feet; thence south 8° 08′ east, 67 feet; thence south 26° 16′ east, 16.09 feet; thence south 76° 26′ east, 12 feet, at which point the said tunnel enters the said Nine Hour Lode mining claim, the property of your orator. And the said defendants have continued the said tunnel on the same course 24 feet further into said mining claim, and they are now engaged in working thereon, and threaten to continue to extend said tunnel into the said mining claim, and to remove therefrom any quartz, rock, or other ore by them encountered in the running of said tunnel, and to appropriate to their own use, any gold, silver or other mineral-bearing quartz rock which they may encounter in the course of said tunnel, and the said defendants threaten to mine and remove ores by means of said tunnel from the said premises so the property of your orator, and so in its possession as aforesaid, to the great injury of your orator, to wit, in its damage in the sum of more than two thousand dollars.

IV.

Your orator further, upon its information and belief, shows and alleges that the said defendants are, and both of them is, insolvent and unable to respond in damages for the injuries committed
5 on your orator's said premises, and those which they are threatening to commit, and that the same constitutes permanent and irreparable injury to said premises.

And your orator has no plain, speedy, and adequate remedy at law, forasmuch as your orator can have no speedy or adequate remedy except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true and perfect answers make, to the matters hereinbefore stated and charged but not under oath an answer under oath being, hereby expressly waived. And your orator further prays that a provisional or preliminary injunction be issued, restraining the said defendants and each and every of them, their agents, and employees, from mining or excavating the said tunnel in the said Nine Hour Lode mining claim, and from removing any quartz rock or other ore, or any rock from said Nine Hour Lode mining claim, through and by means of said tunnel; that upon the final hearing of this case, the said writ of injunction may be made perpetual and the said defendants and each and every of them may be perpetually enjoined and restrained from further running said tunnel into the said Nine Hour Lode mining claim, or from mining any quartz or other ore, or any rock from said Nine Hour Lode mining claim, by means of said tunnel.

Your orator further prays your honors to grant unto your
6 orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of

America directed to the said St. Louis Mining and Milling Company of Montana, and to the said William Mayger, commanding them on a day certain to appear and to answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court may seem proper, and required by the principles of equity and good conscience.

MONTANA MINING COMPANY, LIMITED,
By C. W. GOODALE, *Supt.*

CULLEN & TOOLE,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Montana, } ss:

C. W. Goodale, being first duly sworn, says: The above-named plaintiff is a corporation and I am an officer thereof, to wit: I am its superintendent and in charge of its business at Marysville, Montana; I have read the foregoing complaint and know the contents thereof, and the facts therein stated are true except as to such matters as are therein stated upon information and belief, and as to such matters I believe it to be true.

C. W. GOODALE.

Subscribed and sworn to before me this 16th day of November, A. D. 1893.

[SEAL.] W. E. CULLEN,
Notary Public.

Title of court and cause. Complaint. In equity. Filed Nov. 16th, 1893. Geo. W. Sproule, clerk.

7 And thereafter, to wit, on the 16th day of November, 1893, a subpœna in equity was issued herein, which is entered of final record herein, and is as follows, to wit:

Subpœna.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

The President of the United States of America, Greeting, to St. Louis Mining and Milling Company of Montana and William Mayger, defendants:

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the courtroom in Helena, on the first day of January, A. D. 1894, to answer a bill of complaint

exhibited against you in said court by Montana Mining Company, Limited, complainant, who is a citizen of the Kingdom of Great Britain, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of our Independence the 118th.

[SEAL.] GEO. W. SPROULE, *Clerk.*

8 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of January next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF MONTANA.

I hereby certify, that I received the within writ on the 16th day of November, 1893, and personally served the same on the 16th day of November, 1893, on the St. Louis Mining and Milling Company of Montana, by delivering to and leaving with William Mayger, the general manager of the said defendant corporation, and on William Mayger, personally, said defendant, named therein personally, at Marysville in the county of Lewis and Clarke, in said district, a copy thereof, together with a copy of the complaint certified to by George W. Sproule, clerk of the circuit court of the United States.

Helena, Nov. 17, 1893.

W. F. FURAY,
United States Marshal,
By R. H. BECKWITH, *Deputy.*

(Endorsed:) No. 303. United States circuit court, ninth circuit, district of Montana. In equity. Montana Mng. Co. Ltd., *vs.* St. Louis M. & M. Co. *et al.* Subpœna. Filed Nov. 17, 1893. Geo. W. Sproule, clerk.

9 And thereafter, to wit, on the 21st day of November, 1898, the amended and supplemental answer of the defendants was filed herein, which is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Amended and Supplemental Answer.

Now come the defendants, and for amended and supplemental answer to the complaint of the plaintiff:

I.

Admit that at the dates mentioned in said plaintiff's complaint, the plaintiff corporation was the owner of, in possession, and entitled to the possession of what is known and described in said complaint as the Nine Hour Lode mining claim, as described and set forth in the United States patent therefor, and that since the commencement of this action the plaintiff-corporation became, and now is, the
10 owner of what is known and designated as the thirty-foot strip or compromise ground as a part and portion of the said Nine Hour Lode claim, but deny that it was or is engaged in working, or threatens to continue to work, or extend said tunnel into the said mining claim of plaintiff for the purpose or with the intention of removing therefrom quartz, rock, or ore-bearing gold, silver, or other valuable metals, or that they threaten to take from said tunnel any quartz, rock or ore of any value whatever, or that they intend or threaten to convert any such quartz, rock, or ore to their own use and benefit, belonging to the said plaintiff, or to which it is entitled, or out of or from any vein, lode, or ledge having the top or apex thereof inside of the said Nine Hour Quartz Lode mining claim, so described as aforesaid, and aver that the said tunnel at the time of the institution of this action and the issuance of the provisional or temporary restraining order therein was being worked and prosecuted through barren country rock which contained and contains no minerals of any value whatever, and that the prosecution of the work upon said tunnel was for the sole purpose and intention of intersecting and tapping a certain vein, lode, or ledge having its top or apex inside the boundary lines of the St. Louis Lode mining claim, to which the said St. Louis Mining and Milling Company of Montana have and held the United States patent title, and which said vein, lode, or ledge apexes within the planes designated in the petition and motion of these defendants for a modification of the injunction herein, and included in the report of the master to whom was referred the questions presented by the
11 said motion and petition; and aver that these defendants have at all times during the dates aforesaid been in the actual

possession and occupation of the said St. Louis Lode mining claim, and of all veins, lodes, or ledges having their top or apex within the surface boundaries of the same, and are entitled to work and mine all such veins, lodes, or ledges, and that the said defendant company is now in the possession of the same and entitled to the possession thereof, and of all the quartz and minerals contained in said veins, lodes, or ledges so having their top or apex within the said St. Louis Lode mining claim as aforesaid.

II.

Defendants deny that they are insolvent and unable to respond for any damages that the said plaintiff has or may sustain by reason of the said wrongs set forth in their said complaint, or any threatened or continuous trespass therein set forth.

Defendants for further answer to the complaint of the plaintiffs aver:

That at and long before the alleged wrongful acts of these defendants the said St. Louis Mining and Milling Company of Montana was, and is now, the owner of the St. Louis Quartz Lode mining claim, which is situated in the Ottawa mining district, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning for the description of lots No. 54 and 55 A at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1 M. C. 54,
12 a mound of stones alongside, from which the quarter section corner on south boundary of section 36, in township 12 north, of range 6 west, of the principal meridian bears south 74 degrees and 15 minutes east, 353 feet distant; thence, first course, magnetic variation nineteen degrees east, south 21 degrees and 15 minutes west, one hundred and two feet, intersect line between townships 11 and 12 north, of range 6 west, a granite stone 15 x 14 x 12 inches, marked 54 M. C. 55 A, four hundred and fifty feet to a point from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 x 5 feet, one hundred feet long, runs south 54 degrees east, six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant, ten hundred and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2 M. C. 55 A, a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west, two hundred and eighty-nine feet distant; thence, second course, magnetic variation nineteen degrees east, south 51 degrees 30 minutes west, four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches marked 3 M. C. 55 A, a mound of stones alongside, from which the southeast location corner bears south 10 degrees east, four hundred and thirty-five feet distant; thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4 M. C. 55 A; a mound of stones alongside, from which the southwest location

corner bears south 79 degrees west one hundred and eighty-
13 two feet distant; thence, fourth course, magnetic variation 19 degrees east, north fifty-one degrees 15 minutes east, four hundred and twenty-five feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5 M. C. 55 A, a mound of stone alongside; thence, fifth course, magnetic variation 19 degrees east, north 21 degrees, 45 minutes east, five hundred and twenty-nine and seven-tenths feet distant, intersects said township line, a granite stone 18 x 14 x 7 inches, marked 54 A, 54 M. C., ten hundred and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6 M. C. 54 A, from which a fir tree 13 inches in diameter marked 6 M. C. 54 B. T. bears north 15 degrees east, twenty-four feet distant, and a pine tree 5 inches in diameter marked 6 M. C. 54 B. T., bears south fifty-four degrees east, twenty-one and five-tenths feet distant; thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east, five hundred and fifteen and five-tenths feet to corner No. 1, of lot No. 40, the Drumlurmon Lode claim, five hundred seventy-nine feet to corner No. 1, the place of beginning, said lot- Nos. 54 and 55 A extending fifteen hundred feet in length along said St. Louis vein or lode—the granted premises in said lots contain eighteen acres and ninety-three hundredths of an acre.

Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to wit:

14 Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south thirty-nine degrees thirty-two minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant; thence north fifty degrees twenty-eight minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim between corners 2 and 3 thereof, two hundred and twenty-six feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south twenty degrees twenty-eight minutes west along said boundary between corners 1 and 2, sixty and five-tenths feet to corner No. 2 of the St. Louis lode; thence south fifty-one degrees thirty minutes, west four hundred and three feet to corner No. 3 of said St. Louis lode; thence north forty-five degrees thirty minutes west along the boundary line of the said St. Louis lode between corners 3 and 4, thirty feet to a point; thence north fifty degrees twenty-eight minutes east along a line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, two hundred and thirty feet to the point of beginning, including an area of about 12,844.50 square feet, together with all mineral contained therein.

And said defendant was in the actual possession and occupation thereof, as well as what is designated in said plaintiff's complaint as the Transcontinental tunnel, save and except that portion of the St. Louis Lode mining claim so described as aforesaid, which is em-

braced in what is known as the thirty-foot strip or compromise ground, which, as defendants are informed and believe, has
15 by the Supreme Court of the United States been adjudged to be a part and portion of the said Nine Hour Lode mining claim.

And these defendants further aver that they were at the time of the issuance of the provisional injunction herein prosecuting and extending said tunnel for the purposes of tapping and intersecting a certain vein, lode, or ledge having its top or apex inside the patented premises of the said defendant company, and outside of the said thirty-foot strip or compromise ground, and that the said tunnel is useful and necessary in and about working that portion of the said vein, lode or ledge so having its top or apex inside the boundary lines of the said St. Louis Lode mining claim described as aforesaid.

That the top or apex of the said vein, lode, or ledge so having its dip and apex inside of the St. Louis Lode mining claim as developed and disclosed, intersects and passes through the west boundary line of the said St. Louis Lode mining claim at the points described by perpendicular planes, as follows, to wit:

Commencing at a projected parallel end line of said St. Louis Quartz Lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward whereat it passes through the hanging wall of said vein, lode or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode mining claim, bears north 12 degrees, 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise at said projected parallel end line, five feet west
16 of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees, 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode mining claim between corners 1 and 2, with the west line of the said thirty foot strip hereinbefore described; thence south fifty degrees, fifty minutes west, 108 feet and along the west line of the said thirty foot strip, to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty foot strip. All of which will more fully appear, reference being had to a plat and map thereof hereto attached, and made a part of this answer, marked Exhibit "A," and to which reference is made.

And these defendants further aver that the said vein, lead, or lode so having its top or apex within the vertical planes aforesaid dips to the east and under and beneath the surface location of the said Nine Hour Lode claim, including the fractional portion thereof so known and designated as the thirty foot strip or compromise ground, and that the continuation of the said tunnel for the purposes afore-

said constitutes the wrongs and grievances complained of by the said plaintiff.

And these defendants for further supplemental answer show unto this honorable court that on the 7th day of June, 1898, the
17 defendant, by petition and motion applied to this honorable court for a modification of the injunction herein, which said application and motion have been referred to the master in chancery, who has reported upon the same, and, as these defendants verily believe, and therefore aver, the only question to be determined is whether or not the said defendants as matter of law, are entitled to prosecute the said tunnel and intersect and tap the said vein so having its top or apex within the planes aforesaid.

Wherefore, defendants having fully answered, ask that the said plaintiff's bill of complaint be dismissed; that the temporary or provisional restraining order herein be set aside and dissolved; and that the defendants have and recover their costs and disbursements in this behalf expended.

E. W. TOOLE AND
THOS. C. BACH,
Of Counsel and Solicitors for Defendants.

UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, } ss:

On this twenty-first day of November, A. D. 1896, personally appeared before me, Harry Harris, a notary public in and for said county and State, William Mayger, general manager and superintendent of The St. Louis Mining and Milling Company of Montana, one of the defendants herein, who being by me duly sworn,
18 deposes and says: That he is an officer, to wit, the general manager and superintendent of said company and familiar with its business; that he has read the foregoing answer and knows the contents thereof; and that the same is true to his best knowledge, information and belief.

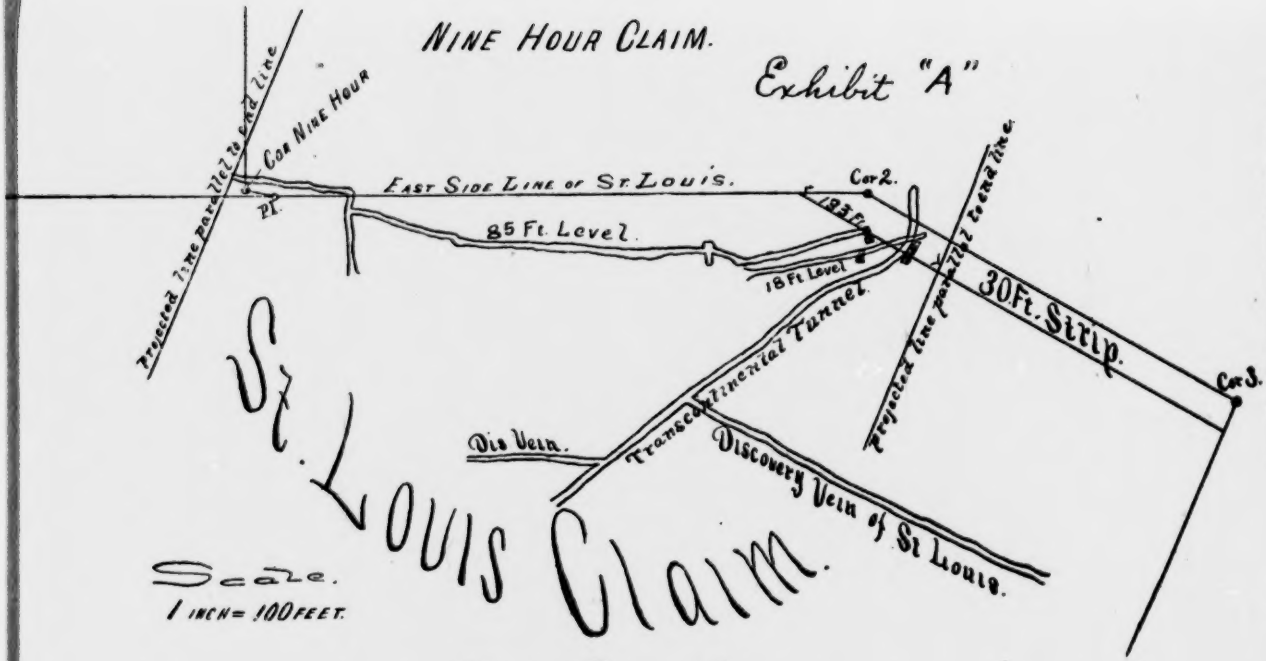
WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-first day of November, A. D. 1898.

[SEAL.]

HARRY HARRIS,
Notary Public in and for said County and State.

(Here follows diagram marked p. 19.)



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v.
Montana M. Co.

vs. The Montana Min. Co., Limited. 19

22961

20 (Endorsed:) Title of court and cause. Answer. Filed Nov. 21, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 26th day of November, 1898, the replication of complainant was filed herein, which is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Replication.

Replication of plaintiff in the above-entitled cause to the amended and supplemental answer of the defendants, The St. Louis Mining and Milling Company of Montana and William Mayger.

This replicant, saving and reserving all advantage of exception to the manifold insufficiencies in said answer, for replication thereto saith that it will aver and prove its said bill to be true and
21 sufficient, and that said answer is untrue and insufficient; wherefore it prays relief as in said bill set forth.

Dated Nov. 26, 1898.

CULLEN, DAY & CULLEN,
Solicitors for Complainant.

Replication. Filed Nov. 26, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 21st day of June, 1899, a stipulation was filed herein, which is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants. } No. —.

Stipulation and Agreed Statement of Facts.

It is hereby stipulated between the above-named parties that this case may be submitted to the court for its judgment upon the follow-

ing agreed statement of facts, which shall be taken and deemed
22 to be the evidence in the case in all respects as if the same were found as the facts by the master in chancery and adopted by the court.

I.

The above-named plaintiff is, and was at all the times mentioned in the pleadings herein, the owner of, in possession, and entitled to the possession of that certain mining claim described in its said complaint as the Nine Hour Lode mining claim, holding the same under a patent therefor from the United States upon a location made under the United States mining acts of 1872 and acts amendatory thereto; that the said Nine Hour Lode mining claim contains valuable deposits of gold, silver and other metals and the said plaintiff has been and is yet engaged in working and mining thereon, and that the value of said mining claim is largely in excess of two thousand dollars.

II.

That the above-named defendant, The St. Louis Mining and Milling Company of Montana, is, and at all the times mentioned in the pleadings herein was, the owner of the St. Louis Lode mining claim, in possession and entitled to the possession thereof, holding the same under a United States patent therefor upon a location made under the United States mining laws of 1872 and acts amendatory thereto. The St. Louis mining claim lies west of and adjoining the Nine Hour claim first herein mentioned, and its value is largely in excess of $2,000.

23 III.

That the said defendants at the time of service upon them of the restraining order in the above-entitled action were engaged in running and drifting a cross-cut tunnel, known as the Transcontinental tunnel, starting within the surface boundaries of the St. Louis claim, and running thence easterly through the said St. Louis claim to the westerly boundary line of the said Nine Hour claim, and thence continuing in a straight line fifteen feet further, and under the surface ground of the said Nine Hour claim, at a depth of about 260 feet; that the said tunnel was run horizontally through country rock and was so run without the consent of the said plaintiff and against its will and without the said defendants, or either of them having obtained from the plaintiff, any right of way for said tunnel beyond the easterly boundary line of the St. Louis claim.

IV.

That the said St. Louis mining claim is a patented mining claim and its location is prior to that of the said Nine Hour claim. That the discovery vein of the said St. Louis claim runs parallel with its

side lines, and one end thereof passes through its south end line, and the other end thereof passes through the other end line, and said vein dips toward the east.

V.

That a vein in its full width of gold-bearing quartz other
24 than said discovery vein wholly enters the easterly side line of said St. Louis claim at a point on said line about 480 feet south from the northeast corner of said claim, and thence runs in a southerly direction and with its apex entirely within the surface of said St. Louis claim until it passes out of the said claim through the said side line and into the Nine Hour claim at a point about 350 feet northerly from the southeasterly corner of said St. Louis claim. The dip of this vein is also to the east, the portion thereof the apex of which is within the surface ground of the St. Louis claim passes on its dip beyond the easterly side line of said claim and under the surface of the said Nine Hour claim.

The tunnel above referred to starts at a point on the St. Louis claim westerly of the strike of said last-mentioned vein and at a point about midway between the point at which said vein enters the surface of the St. Louis claim and the points at which it departs therefrom, and runs toward the said vein, and if extended will intersect said vein at a point thereon which is between perpendicular planes passed through the end lines of the St. Louis claim (which are parallel) and is also between perpendicular planes parallel to the above-mentioned planes passed through the two points at which said vein intersects the east side of said St. Louis claim and will not intersect any other vein or lode, before the intersection of the vein above referred to, and that the defendant will not extend said tunnel beyond the point at which it will intersect said vein
which apexes within the St. Louis claim as above mentioned,
25 but proposes and intends to use said cross-cut tunnel in working and mining said vein within the vertical planes last aforesaid on its dip to the full extent of the depth thereof, which constitutes the alleged trespass threatened and intended by said defendants.

VI.

This stipulation is not intended to, nor shall it in any manner affect the rights of either party, or any of the parties, to any damage or injury they or any of them may sustain or may have sustained on account of any trespass upon said lode claims or any conversion of any quartz rock or ore taken therefrom, and is not intended and shall not limit the rights of either party under the law to any claim for damages but said stipulation is intended to be and is limited to the question of the right to an injunction within the planes aforesaid, on account of the extension of said cross-cut tunnel; and this stipulation shall not be considered as evidence of any

fact herein stipulated in any other action now pending or which may hereafter be commenced between the parties hereto.

CULLEN, DAY & CULLEN,
Attorneys for Plaintiff.
E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Defendant.

(Endorsed:) Title of court and cause. Stipulation. Filed June 21, 1899. Geo. W. Sproule, clerk.

26 And thereafter, to wit, on the 3d day of December, 1900, an order was duly made adopting agreed statement of facts, which said order is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Complainant,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA AND WILLIAM MAYGER, Defendants.

Order Adopting Agreed Statement of Facts.

This cause having been submitted to the court upon an agreed statement of facts—

It is hereby ordered that the same be adopted, and the same is hereby adopted, by the court, as the findings of the facts involved in this cause, and the court bases its decree thereon.

Helena, Montana, December 3d, 1900.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Order. Filed and entered Dec. 3d, 1900. Geo. W. Sproule, clerk.

27 And thereafter, to wit, on the 3d day of December, 1900, a final decree was duly filed and entered herein, which is entered of final record and being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Complainant,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF Montana and William Mayger, Defendants.

No. 303. Perpetual Injunction.

Final Decree.

This cause coming on to be heard at this term of court upon the bill of complaint, the answer and the replication, and upon an agreed statement of facts, the cause having been submitted to the court upon the said pleadings, and statement without further evidence, and the court having adopted the said agreed statement of facts, and having made the same the findings of fact by the court and the judge thereof, and the same having been argued by counsel; thereupon, upon consideration thereof—

28 It is ordered, adjudged, and decreed as follows: That you, the said defendants, and each of you, your agents, servants, and employees, are forever perpetually forbidden and restrained from further prosecuting work on your Transcontinental tunnel in said bill of complaint herein more particularly set forth and described, beneath the surface of the Nine Hour Lode mining claim of the said complainant, and from mining and removing any quartz, rock, or ore belonging to said mining claim by means of said tunnel or from extending your said tunnel further into said mining claim.

Dated Helena, Montana, this 3d day of December, 1900.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Final decree. Filed and entered Dec. 3d, 1900. Geo. W. Sproule, clerk.

Enrollment.

Whereupon, said pleadings, process, orders, and final decree are entered of final record in accordance with law and the practice of this court.

Attest my hand and the seal of said court at Helena, Montana, this 3d day of December, A. D. 1900.

GEO. W. SPROULE, *Clerk.*

Filed December 3d, 1900.

GEO. W. SPROULE, *Clerk.*

29 And thereafter, to wit, on the 29th day of May, 1901, the defendant herein filed its assignment of errors, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Assignment of Errors.

And now, on this 29th day of May, 1901, come the defendants in the above-entitled cause, by E. W. Toole and Thomas C. Bach, their solicitors, and say that the decree in said cause is erroneous and against the just rights of said defendants, for the following reasons:

First. Because it appears from the agreed statement of facts upon which said decree was rendered that the tunnel upon which these defendants are by said decree enjoined from further prosecuting any work was being driven for the purpose of intersecting a por-
30 tion of a vein of gold-bearing quartz which belongs to the defendant, St. Louis Mining and Milling Company of Montana.

Second. Because it appears from said agreed statement that the said tunnel if extended in the manner intended by these defendants, will intersect the said portion of said vein at a point therein which belongs to the said St. Louis Mining and Milling Company of Montana.

Third. Because it appears from said agreed statement that said tunnel, if extended in the manner as intended by said defendants and set forth in said statement, will not intersect any other vein or lode before it intersects that portion of the vein above referred to, and which is the property of the defendant, St. Louis Mining and Milling Company of Montana.

Fourth. Because it appears from said agreed statement of facts that the defendants will not extend said tunnel beyond the point at which it will intersect that portion of the said vein, which belongs to the said St. Louis Mining and Milling Company.

Fifth. Because it appears from said agreed statement of facts that the defendants intend to use said tunnel only in working and mining that portion of the vein mentioned in the pleadings and in said statement, which is the property of the said St. Louis Mining and Milling Company.

Sixth. Because it appears from the agreed statement of facts herein, and upon which said decree was rendered and entered, that the only trespass which the defendants threaten or intend is the driving of an underground cross-cut tunnel which commenced under the surface of the property belonging to the defendant, St.
31 Louis Mining and Milling Company of Montana, and which tunnel defendants intend to continue until it shall intersect a portion of a vein of gold-bearing quartz, which portion of said vein belongs to the St. Louis Mining and Milling Company of Montana,

and is underneath the surface ground belonging to the plaintiff, and which said tunnel said defendants will not extend beyond the point of which it will intersect that portion of the vein referred to, which belongs to the St. Louis Mining and Milling Company of Montana; and which said tunnel so extended will not intersect any other vein than that referred to, and which said tunnel the said defendants intend and propose to use in working that portion of the vein referred to, and which belongs to the said St. Louis Mining and Milling Company of Montana, as appears from the said statement of facts.

Seventh. Because it appears that said tunnel is being extended and will be extended through what is known as the country rock, not included in plaintiff's grant under its patent, and that said tunnel will in no manner interfere with the surface of any vein, lode, or ledge included within said patent, and for that no injury, irreparable or otherwise, will be sustained by said plaintiff.

Therefore, the said defendants pray that the said decree be reversed, and that the said court may be directed to enter a decree dismissing the bill of complaint herein.

E. W. TOOLE AND
THOS. C. BACH,
Solicitors for Defendants.

32 (Endorsed:) Title of court and cause. Assignment of errors. Filed and entered May 29, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 29th day of May, 1901, the defendant filed its petition for allowance of appeal herein, which said petition, together with the allowance of said appeal, is in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Defendants.

Petition for Appeal and Order Allowing Same.

To the Honorable Hiram Knowles, district judge, and one of the judges of the above-named court, presiding therein:

The above-named defendants, The St. Louis Mining and Milling Company of Montana and William Mayger, conceiving themselves aggrieved by the decree made and entered on the 3d day of December 1900, in the above-entitled cause, do hereby appeal from said decree to the United States circuit court of appeals

33

of the ninth circuit, for the reasons specified in the assignments of errors which is filed herewith; and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, be sent to the United States court of appeals for the ninth circuit.

Dated this 29th day of May, 1901.

E. W. TOOLE AND
THOS. C. BACH,
Solicitors for the Defendants.

The foregoing claim of appeal is allowed, and the bond on appeal is fixed at the sum of three hundred dollars ($300).

Done in open court, this 29th day of May, 1901.

HIRAM KNOWLES,
District Judge and One of the Judges of said Court, Presiding Therein, and by Whom said Order and Decree was Signed.

(Endorsed:) Title of court and cause. Petition for appeal and order. Filed and entered May 29th, 1901. Geo. W. Sproule, clerk.

34 And thereafter to wit, on the 29th day of May, 1901, a bond on appeal was filed and duly approved herein, which said bond is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Bond on Appeal.

Know all men by these presents, that we, The St. Louis Mining and Milling Company of Montana, a corporation organized and doing business under and by virtue of the laws of the State of Montana, and William Mayger of Marysville, Montana, the defendants in the above-entitled action, as principals, and the United States Fidelity and Guaranty Company, a corporation, are held and

35 firmly bound unto the above-named plaintiff, The Montana Mining Company, Limited, in the full and just sum of three hundred dollars ($300.00), to be paid to the said plaintiff, The Montana Mining Company, Limited, its successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of May, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the circuit court of the United States for the ninth circuit, district of Montana, in a suit depending in said court, between The Montana Mining Company, Limited, plaintiff, and The St. Louis Mining and Milling Company of Montana, and William Mayger, defendants, a decree was rendered against said St. Louis Mining and Milling Company and William Mayger, and the said St. Louis Mining and Milling Company and William Mayger, having obtained an appeal and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, and a citation directed to the said Montana Mining Company, Limited, citing and admonishing it to be and appear at a session of the United States court of appeals for the ninth circuit, to be holden at the city of San Francisco, California, in the said circuit, thirty days from date hereof.

36 Now, the condition of the above obligation is such that if the said St. Louis Mining and Milling Company of Montana and William Mayger shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said plea good, then the above obligation to be void; otherwise to be in full force and virtue.

WM. MAYGER.
ST. LOUIS MINING AND MILLING CO. OF MONTANA,
By WM. MAYGER, *M'ng'r.* [SEAL.]
[SEAL.] UNITED STATE. FIDELITY & GUARANTY CO.,
By GEO. L. RAMSEY,
Its Attorney in Fact.

Signed, sealed, and delivered in the presence of:
THOS. C. BACH.

Approved by:
HIRAM KNOWLES, *Judge.*

May 29, 1901.

(Endorsed:) Title of court and cause. Bond on appeal. Filed and entered, May 29, 1901. Geo. W. Sproule, clerk.

37 And thereafter, to wit, on said 29th day of May, 1901, a citation was duly issued, served, and filed herein, which said citation is as follows:

Citation.

UNITED STATES OF AMERICA, *District of Montana*, } ss:

The President of the United States of America to the Montana Mining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the ninth circuit, at the city of San Francisco, in the State of California, on the 28th day of June, A. D. 1901, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, ninth circuit, district of Montana, wherein The St. Louis Mining and Milling Company of Montana and William Mayger are the defendants and appellants, and you are the complainant and respondent, to show cause, if any there be, why the decree entered in this case against the above-named defendants on the 3d day of December, A. D. 1900, by the Honorable Hiram Knowles, United States district judge, for the district of Montana, as in the petition of the defendants on appeal herein mentioned, should not be reversed, set aside, and annulled, and why speedy justice should not be done to the parties in this behalf.

38 Witness, the Honorable Hiram Knowles, United States district judge for the district of Montana, at Helena, Montana, this 29th day of May, A. D. 1901.

[SEAL.] HIRAM KNOWLES,
United States District Judge for the District of Montana.

We hereby, this 29th day of May, 1901, accept due personal service of this citation on behalf of The Montana Mining Company, Limited, complainant and appellee.

CULLEN, DAY & CULLEN,
Solicitors and of Counsel for Appellees.

Filed and entered May 29, 1901.

GEO. W. SPROULE, *Clerk.*

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Montana*, } ss:

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 37 pages, numbered consecutively from 1 to 37, is a true and correct transcript of the plead-

ings, process, orders, decree and all proceedings had in said cause, and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

39 I further certify that the costs of the transcript of record amounts to the sum of twenty-five and 75–100 dollars ($25.75), and has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States circuit court for the district of Montana, at Helena, Montana, this 20th day of June, A. D. 1901.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 714. In the United States circuit court of appeals for the ninth circuit. The St. Louis Mining and Milling Company of Montana and William Mayger, appellants, *vs.* The Montana Mining Company, Limited, appellee. Transcript of record. Appeal from the circuit court of the United States for the district of Montana. Filed June 25, 1901. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

40 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Thursday the seventeenth day of October in the year of our Lord one thousand, nine hundred and one.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Appellants,
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee. } No. 714.

Order of Submission.

This cause coming on regularly for hearing this day and there being no appearance of counsel on behalf of the respective parties,

Ordered appeal submitted to the court for consideration and decision on briefs.

41 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF Montana and William Mayger, Appellants,
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee.
} No. 714.

Appeal from the United States circuit court for the district of Montana.

Toole & Bach for the appellants. W. E. Cullen, E. C. Day and W. E. Cullen, Jr., for the appellee.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court:

The St. Louis Mining and Milling Company is the owner of the St. Louis Lode mining claim and The Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour Lode mining claim which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward and into the Nine Hour claim for the purpose of reaching and mining a lode which had its apex in the St. Louis claim and which they had the right to pursue on its downward course as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the
42 St. Louis claim, and that in the course of its progress there would be encountered no other vein, lode or ledge. At the suit of the owner of the Nine Hour claim the circuit court enjoined the appellants from proceeding further with said tunnel, from that decree the present appeal is taken.

The case involves the interesting question, whether the owner of a mining claim who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim, is confined in his right to operations within or upon the vein itself and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that since the mining law confers the general right to explore and purchase the mineral lands of the United States the appellants in this instance have the right to explore within the Nine Hour claim and thereby to reach their own property so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute, section 2322, and the patent there-

upon issued, confers upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations," and that the statute further specifies that such locators, notwithstanding their extra-lateral rights, shall have no authority to
43 enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim except the veins or lodes therein which may have their apices in the surface of another claim, so as to give the owner of the latter extra-lateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims so as to confer extra-lateral rights. This is their right and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws as we construe them grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute, section 2319, declares "the lands" in which valuable mineral deposits are found, to be open to occupation and purchase, and section 2325 provides that "A patent for any land claimed and located for valuable deposits may be obtained in the following manner:" These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common law ownership. The reason for specifying in the
44 description of the grant the "veins, lodes and ledges," is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Parrot Silver & Copper Co. *v.* Heinze *et al.*, 64 Pac. Rep. 326, the supreme court of Montana held in substance that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a

depth of 1300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: "Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant." Of similar import is State *v.* District Court, 65 Pac. Rep. 1020. In Doe *v.* Mining Co., 54 Fed. 935, Judge Ross said: "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common-law." In Consolidated Wyoming G. M. Co. *v.* Champion Min. Co., 63 Fed. 540, Judge Hawley said: Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which
45 has its apex within your surface claim." We find no error in the decree of the circuit court. The decree is affirmed.

(Endorsed:) Opinion. Filed March 10, 1902, F. D. Monckton, clerk.

46 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Appellants,
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee.
} No. 714.

Appeal from the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered Mar. 10, 1902, F. D. Monckton, clerk.

47 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellant and Defendant,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent and Plaintiff.

Petition for Appeal.

The above named appellants (and defendants in the circuit court), The St. Louis Mining and Milling Company of Montana and William Mayger, conceiving themselves aggrieved by the judgment and decree made and entered on the 10th day of March, 1902, in the above entitled cause, in the above entitled court, and affirming the decree of the circuit court, do hereby appeal from said judgment and decree of affirmance to the Supreme Court of the United States, for the reasons specified in the assignments of errors which is filed herewith; and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

Dated this 25th day of February, A. D. 1903.

E. W. TOOLE &
T. C. BACH,
Solicitors for said Appellants.

(Endorsed:) Petition for appeal to Supreme Court U. S. Filed March 2, 1903. F. D. Monckton, clerk.

48 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellants,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent.

Assignment of Errors.

And now, on this 25th day of February, A. D. 1903, came the appellants in the above entitled cause (defendants in the circuit court) by E. W. Toole and Thomas C. Bach, their solicitors, and say: That the judgment of the said court of appeals, affirming the decree of the circuit court in said cause, is erroneous and against the just rights of said defendants, the appellants in the above entitled cause, for the following reasons:

First. Because it appears from the agreed statement of facts, upon which said judgment and decree were rendered, that the tunnel upon which these appellants are, by said decree, so affirmed by the United States circuit court of appeals, enjoined from further prosecuting any work, was being driven for the purpose of intersecting a portion of a vein of gold bearing quartz which belongs to the appellant, St. Louis Mining and Milling Company of Montana.

Second. Because it appears from said agreed statement that the said tunnel if extended in the manner intended by these appellants, will intersect the said portion of said vein, at a point therein
49 which belongs to the said St. Louis Mining and Milling Company of Montana.

Third. Because it appears from the said agreed statement that said tunnel, if extended in the manner intended by said appellants, and set forth in said statement, will not intersect any other vein or lode before it intersects that portion of the vein above referred to, and which is the property of the appellant, St. Louis Mining and Milling Company of Montana.

Fourth. Because it appears from said agreed statement of facts that the appellants will not extend said tunnel beyond the point at which it will intersect that portion of the said vein, which belongs to the said St. Louis Mining and Milling Company.

Fifth. Because it appears from said agreed statement of facts that the appellants intend to use said tunnel only in working and mining that portion of the vein mentioned in the pleadings and in said statement, which is the property of the said St. Louis Mining and Milling Company.

Sixth. Because it appears from the agreed statement of facts herein, and upon which said judgment and decree was rendered and entered, that the only trespass which it is asserted or claimed the defendants in the circuit court (appellants herein) intend or threaten, is the driving of an underground cross cut, which commenced under the surface of the property belonging to the appellant, St. Louis Mining and Milling Company, of Montana, and which tunnel appellants intend to continue until it shall intersect a portion of a vein of gold-bearing quartz, which portion of said vein belongs to the St. Louis Mining and Milling Company of Montana, and is underneath the surface ground belonging to the respondent, and which said tunnel said appellants will not extend beyond the point of which it will intersect that portion of the vein referred to, which belongs to the St. Louis Mining and Milling Company of
50 Montana; and which said tunnel, so extended will not intersect any other vein than that referred to, which said tunnel the said appellants intend and propose to use in working that portion of the vein referred to, and which belongs to the said St. Louis Mining and Milling Company, of Montana, as appears from the said statement of facts.

Seventh. Because it appears that said tunnel is being extended and will be extended through what is known as the country rock, not included in respondent's grant under its patent, and that said

tunnel will in no manner interfere with the surface or any vein, lode or ledge included within said patent, and for that no injury, irreparable or otherwise will be sustained by said respondent.

Therefore, the said appellants pray that the said judgment and decree be reversed, and that the said circuit court of appeals be directed to reverse its said judgment.

E. W. TOOLE AND
THOS. C. BACH,
Solicitors for Appellants.

(Endorsed:) Assignment of errors. Filed March 2, 1903, F. D. Monckton, clerk.

51 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellants,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent.

This 2nd day of March, 1903, came the appellants herein, by their attorneys, and filed herein and presented to the court their petition, praying for the allowance of an appeal, intended to be urged by them, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the appeal, and approve the bond on file herein.

WM. B. GILBERT,
U. S. Circuit Judge.

(Endorsed:) Order allowing appeal to Supreme Court U. S. Filed March 2, 1903, F. D. Monckton, clerk.

52 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellants,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent.

Bond on Appeal.

Know all men by these presents, that we, the St. Louis Mining and Milling Company of Montana, a corporation organized and

doing business under and by virtue of the laws of the State of Montana, and William Mayger of Marysville, Montana, the appellants in the above entitled action, as principals, and the United States Fidelity and Guaranty Company, a corporation, are held and firmly found unto the above-named respondent, The Montana Mining Company, Limited, in the full and just sum of five hundred dollars ($500.00) to be paid to the said respondent, The Montana Mining Company, Limited, its successors and assigns, to which payment, well and truly to be made, we bind ourselves jointly and severally, by these presents.

Sealed with our seals and dated this 25 day of February, A. D. 1903.

53 Whereas, lately in the United States circuit court of appeals for the ninth judicial circuit, in a suit pending in said court, between The Montana Mining Company, Limited, respondent and The St. Louis Mining and Milling Company of Montana and William Mayger, appellants, a judgment was rendered, affirming the decree of the circuit court, which decree was rendered against the said St. Louis Mining and Milling Company and William Mayger, and the said St. Louis Mining and Milling Company of Montana and William Mayger, having obtained an appeal and filed a copy thereof in the clerk's office of said court, to reverse the judgment affirming said decree in the aforesaid suit, and a citation directed to the said Montana Mining Company, Limited, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C. 60 days from the date hereof;

Now the condition of the above obligation is such that if the said St. Louis Mining and Milling Company of Montana and William Mayger shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said plea good, then the above obligation to be void; otherwise to be in full force and virtue.

Dated: February 25, 1903.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
By WILLIAM MAYGER, *Manager.*
WILLIAM MAYGER.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK BOGART, *Its Attorney-in-fact.*

Signed, sealed and delivered in presence of—

W. J. THOMSON,
Witness as to Frank Bogart.
I. T. WRIGHT,
Witness — William Mayger.

54 STATE OF MONTANA, } ss.
County of Lewis & Clarke, }

Before me, Ira T. Wright, a notary public, in and for the county and State aforesaid, appeared the St. Louis Mining and Milling Company of Montana, a corporation, by William Mayger, its manager, and William Mayger, personally, and acknowledged that said corporation and said William Mayger executed the foregoing bond as principals thereof; and that the United States Fidelity and Guaranty Company, a corporation, appeared before me by Frank Bogart, known to me to be its attorney in fact, and acknowledged that said corporation executed said bond, as surety thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this 25th day of February, 1903.

IRA T. WRIGHT,
Notary Public in and for the County of Lewis & Clarke, State of Montana.

55 *Power of Attorney Granted to George L. Ramsey and Frank Bogart by the United States Fidelity and Guaranty Company of Baltimore.*

Know all men by these presents, that the United States Fidelity and Guaranty Company, a body corporate duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint George L. Ramsey and Frank Bogart, of the city of Helena, county of Lewis and Clarke and State of Montana, to be its true and lawful attorneys, in and for the State of Montana, for the following purposes:

To sign its name as surety to, and to execute, acknowledge, justify upon, and deliver, any and all stipulations, bonds and undertakings, given or required in any judicial action or proceedings brought or pending within the said State.

It being the intention of this power of attorney, to fully authorize and empower the said George L. Ramsey and the said Frank Bogart, or either one of them, to sign the name of said company, and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully, and to all intents and purposes as if done by the duly authorized officers of said company, with the seal of said company thereto affixed, and the said company hereby ratifies and confirms all and whatsoever the said George L. Ramsey and the said Frank Bogart, or either one of them, may lawfully do in the premises by virtue of these presents.

In witness whereof, the said The United States Fidelity and Guaranty Company, pursuant to a resolution of its board of directors, duly passed on the 11th day of July, A. D. 1898 (a
56 certified copy of which is hereby annexed) has caused these presents to be sealed with its common and corporate seal

duly attested by its president and by its ass't secretary, this ninth day of March, A. D. 1900.

THE UNITED STATES FIDELITY AND GUARANTY CO.
[SEAL.] JOHN R. BLAND, *President.*
ARTHUR C. PIERCE,
Ass't Secretary.

(Government revenue 25c. stamp.)

STATE OF MARYLAND, *City of Baltimore,* } ss:

I, Edw. B. Ambler, a notary public, duly appointed and qualified, in and for the city and State aforesaid, hereby certify that on this ninth day of March, A. D., 1900, personally appeared before me, John R. Bland, president, and Arthur C. Pierce, ass't secretary, of the United States Fidelity and Guaranty Company, to me personally known to be the said officers of the said corporation, and the individuals who executed the foregoing instrument, and they each duly acknowledged the execution of the same as the act and deed of said corporation; and being by me each duly sworn severally and each for himself, did depose and say that they are the said officers of the said corporation, and that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said corporate seal, and their signatures as such officers, were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year above written.

[SEAL.] EDWARD B. AMBLER,
Notary Public.

57 *Copy of Resolution.*

That whereas, it is often necessary, in order to facilitate the business of the company in States other than Maryland, and in the Territories, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness;

Now therefore, be it resolved, that the president, or one of the vice-presidents, and the secretary, or assistant secretary, be, and they are hereby authorized, to appoint one or more persons residing in the States other than Maryland, and in the Territories of the United States, to sign the name of the company as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings, given or required in any judicial action or proceeding within any one of the said States or Territories, and that

the said person or persons so appointed are hereby authorized and empowered to sign the name of the company, and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the company to all intents and purposes, as if done by its duly authorized officers, and the company, through us, its board of directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, Arthur C. Pierce, ass't secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the board of directors of the said company at a regular meeting thereof, duly called and held on the 11th day of July, A. D. 1898, a quorum
58 being present, as the same appears on the records of the company now in my possession and custody as ass't secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of the said company, at the city of Baltimore, Maryland, this ninth day of March, A. D. 1900.

[SEAL.] ARTHUR C. PIERCE,
Ass't Secretary.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, Joseph W. Chivers, a notary public in and for the county of Lewis and Clarke, State of Montana, do hereby certify that the above and foregoing is a full and correct copy of the power of attorney, granted by the United States Fidelity & Guaranty Company to George L. Ramsey, and Frank Bogart, under date of March 9th, A. D. 1900; together with certificate of authenticity, signed by Edward B. Ambler, notary public; copy of the resolution by the directors of the United States Fidelity and Guaranty Company, and certificate of authenticity, signed by Arthur C. Pierce, ass't secretary. I further certify that the power of attorney was filed in duplicate original, in the office of the clerk of the supreme court, State of Montana, and endorsed: "Filed March 16th, 1900. Henry G. Rickerts, clerk of the supreme court for the State of Montana;" and that it was filed in the office of the clerk of the United States court, for the district of Montana, and endorsed: "Filed and entered March 16th, 1900. Geo. W. Sproule, clerk of the U. S. district court, district of Montana."

If witness whereof, I have hereunto set my hand, and affixed my seal, in the city of Helena, Montana, this 25th day of February, 1903.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

59 *Certificates from the State Auditor, Secretary of State, and Clerk and Recorder of Lewis and Clarke County.*

No. 911.

Insurance License.

STATE OF MONTANA, AUDITOR'S OFFICE,
DEPARTMENT OF INSURANCE.

Whereas, the United States Fidelity and Guaranty Company, organized under and pursuant to the laws of Maryland, located and having its principal place of business at Baltimore, has in all respects complied with the requirements of the laws of the State of Montana, governing insurance companies transacting business therein, and has paid to said State all fees and charges, which by said laws are required to be paid.

Now therefore, I, J. H. Calderhead, auditor of the State of Montana, by virtue of the authority in me vested by law, do hereby authorize, empower and license the aforesaid insurance company to collect through duly appointed agents, in the State of Montana, insurance premiums amounting to $5,000.00, in accordance with the laws thereof. This license expires on the 31st day of March, 1902, unless sooner revoked by competent authority of the State.

In witness whereof, I have hereunto set my name and affixed my official seal, at the said capital, at the city of Helena, the 1st day of April, A. D. 1901.

[SEAL.] J. H. CALDERHEAD,
State Auditor.

60 No. 2071.

Agent's License.

STATE OF MONTANA, AUDITOR'S OFFICE,
DEPARTMENT OF INSURANCE.

Whereas, the United States Fidelity and Guaranty Company, located at Baltimore, Md., having fully complied with the requirements of the laws of the State of Montana, and a license issued to said company authorizing and empowering said company to transact through its duly appointed agents, the business of surety insurance in the State of Montana, in accordance with the laws thereof, until revoked by competent authority of the State.

Now, therefore, it is hereby certified, that George L. Ramsey, of Helena, Lewis and Clarke county, State of Montana, having been appointed by the proper officers of said company, are hereby authorized to transact business according to law for said company, so far

as he may be legally empowered by said company, until the thirty-first day of March, 1902, unless this license is sooner revoked.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, at the State capital, at the city of Helena, this 1st day of April, 1901.

[SEAL.] J. H. CALDERHEAD,
State Auditor.

61 OFFICE OF SECRETARY OF STATE.

UNITED STATES OF AMERICA, *State of Montana*, } ss:

I, Geo. M. Hays, secretary of *the* state of the State of Montana, do hereby certify that the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, did, on the twelfth day of September, A. D. 1899, file a certified copy of its charter, an appointment and acceptance of agent, and a financial statement; also that said company did, on the sixth day of February, A. D. 1901, file in this office, a copy of its financial statement, as of December 31st, A. D. 1900, all, in compliance with section 1030–1038 of the Civil Code of the State of Montana; and I do further certify that said company, having complied with the laws relating to foreign corporations, is entitled to transact business in the State of Montana.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Montana, this the second day of April, A. D. 1901.

[SEAL.] GEO. M. HAYS,
Secretary of State.

(10c. revenue stamp.)

62 Office of the county clerk and recorder for the county of Lewis and Clarke, State of Montana.

STATE OF MONTANA, *County of Lewis and Clarke*, } ss:

I, Sidney Miller, county clerk and recorder of Lewis and Clarke county, State of Montana, do hereby certify that the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, did, on the second day of April, A. D. 1900, file a certify- copy of its charter, a financial statement, and an appointment and acceptance of agent, (this latter, being dated the 12th day of September, 1899) also that said company did, on the sixth day of February, A. D. 1901, file in this office, a copy of its financial statement, as of December 31st, A. D. 1900, all, in compliance with sections 1030–1038 of the Civil Code of the State of Montana; and I do further certify that said company, having complied with the laws relating to foreign corporations, is as

regards this office, duly entitled to transact business in compliance with the Statutes of the State of Montana.

In testimony whereof, I have hereunto set my hand and affixed the seal of the county of Lewis and Clarke, State of Montana, this second day of April, A. D. 1901.

[SEAL.] SIDNEY MILLER,
County Clerk and Recorder.

(10c. revenue stamp.)

63 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, Joseph W. Chivers a notary public in and for the county of Lewis and Clarke, State of Montana, do hereby certify that the above and preceding four recitals are full and correct copies of the certificates of authority granted in the State of Montana to the United States Fidelity and Guaranty Company, of Baltimore, Maryland, under the dates set forth therein, respectively.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Helena, Montana, this 25th day of February, 1903.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

(Endorsed:) Bond on appeal. Form of bond and sufficiency of surety approved March 2, 1903. Wm. B. Gilbert, circuit judge. Filed March 2, 1903, F. D. Monckton, clerk.

64 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF Montana and William Mayger, Appellants, } No. 714.
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee. }

Certificate of Clerk C. C. A. to Transcript of Record.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-three (63) pages, numbered from one (1) to sixty-three (63), inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above entitled case as the same appear of record in my office, and that the same, together, constitute the transcript of record herein upon appeal to the Supreme Court of the United States.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 17th day of March, A. D. 1903.

F. D. MONCKTON, *Clerk.*

65 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Montana Mining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, within sixty (60) days from the date hereof, pursuant to an order allowing an appeal, of record in the office of the clerk of the United States circuit court of appeals for the ninth circuit in that certain cause wherein The St. Louis Mining and Milling Company of Montana and William Mayger are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, senior United States circuit judge for the ninth circuit, this 2d day of March, A. D. 1903.

WM. B. GILBERT,
Senior United States Circuit Judge.

Due and timely service of the above citation is hereby admitted this 7th day of March 1903, and acknowledge receipt of copy thereof at the same time.

CULLEN, DAY & CULLEN,
Attorneys for the Montana Mining Company, Ltd.

66 [Endorsed:] No. 714. United States circuit court of appeals for the ninth circuit. St. Louis Mining and Milling Co. of Montana, and William Mayger *vs.* The Montana Mining Company, Limited. Citation. Filed March 11, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Endorsed on cover: File No. 18,882. U. S. circuit court of appeals, ninth circuit. Term No. 250. The St. Louis Mining and Milling Company of Montana and William Mayger, appellants, *vs.* The Montana Mining Company, Limited. Filed April 4, 1903. File No. 18,882.

FILE COPY.

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Office Supreme Court U. S.
FILED
FEB 19 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court

OF THE

United States.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, and WILLIAM MAYGER,
Appellants,

vs.

MONTANA MINING COMPANY, LIMITED,
Appellee.

250

BRIEF OF APPELLANTS.

E. W. TOOLE,
THOS. C. BACH,

Solicitors and of Counsel for Appellants.

In the Supreme Court

OF THE

United States.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, and WILLIAM MAYGER,

Appellants,

VS.

MONTANA MINING COMPANY, LIMITED.

STATEMENT OF FACTS.

This suit was brought by the Montana Mining Company, Limited, against the St. Louis Mining and Milling Company, of Montana, and William Mayger, Mayger being the Superintendent of the St. Louis Mining and Milling Company. The Montana Mining Company, Limited, was, at the time of the commencement of the cause, ever since has been and now is a corporation duly organized and existing under the laws of the Kingdom of Great Britain, and a resident of said Kingdom; the said St. Louis Mining and Milling Company, of Montana was, at said time of the commencement of this cause, ever since has been and now is a corporation organized and existing under the laws of the State of Montana, and the said William Mayger is and was at the time this suit was commenced a citizen and resident of that State. The suit was commenced for an injunction preventing the St. Louis

Mining and Milling Company from driving a tunnel which had its inception in the property belonging to the St. Louis Mining and Milling Company and was driven for the purpose of tapping the vein belonging to the said St. Louis Company on its dip under the surface ground belonging to the Nine Hour lode, a mining property belonging to the said Montana Mining Company, Limited.

A stipulation and agreed Statement of Facts (See Record p. 11) was made between the parties, which said agreed statement of facts the trial court adopted, and based its decree thereon (See Record p. 14.)

Said agreed statement of facts, upon which said decree is based, are as follows:

"STIPULATION AND AGREED STATEMENT OF FACTS.

"It is hereby stipulated between the above-named parties that this case may be submitted to the court for its judgment upon the following agreed statement of facts, which shall be taken and deemed to be the evidence in the case in all respects as if the same were found as the facts by the master in chancery and adopted by the Court:

I.

"The above-named plaintiff is, and was at all the times mentioned in the pleadings herein, the owner of, in possession, and entitled to the possession of that certain mining claim described in its said complaint as the Nine Hour Lode Mining Claim, holding the same under a patent therefor from the United States upon a location made under the United States mining act of 1872 and acts amendatory thereto; that the said

Nine Hour Lode Mining Claim contains valuable deposits of gold, silver and other metals and the said plaintiff has been and is yet engaged in working and mining thereon, and that the value of said mining claim is largely in excess of two thousand dollars.

II.

"That the above-named defendant, the St. Louis Mining and Milling Company of Montana, is, and at all the times mentioned in the pleadings herein was, the owner of the St. Louis Lode Mining Claim, in possession and entitled to the possession thereof, holding the same under a United States patent therefor upon a location made under the United States mining laws of 1872 and acts amendatory thereto. The St. Louis Mining Claim lies west of and adjoining the Nine Hour Claim first herein mentioned, and its value is largely in excess of two thousand dollars.

III.

"That the said defendants at the time of service upon them of the restraining order in the above-entitled action were engaged in running and drifting a cross-cut tunnel, known as the Transcontinental Tunnel, starting within the surface boundaries of the St. Louis Claim, and running thence easterly through the said St. Louis Claim to the westerly boundary line of the said Nine Hour Claim, and thence continuing in a straight line fifteen feet further, and under the surface ground of the said Nine Hour Claim, at a depth of about 260 feet; that the said tunnel was run horizontally through country rock and was so run without the consent of the said plaintiff and against its will and without the said defendants, or either of

them having obtained from the plaintiff, any right of way for said tunnel beyond the easterly boundary line of the St. Louis Claim.

IV.

"That the said St. Louis Mining Claim is a patented mining claim and its location is prior to that of the said Nine Hour Claim. That the discovery vein of the said St. Louis Claim runs parallel with its side lines, and one end thereof passes through its south end line, and the other end thereof passes through the other end line, and said vein dips toward the east.

V.

"That a vein in its full width of gold-bearing quartz, other than said discovery vein, wholly enters the easterly side line of said St. Louis Claim at a point on said line about 480 feet south from the northeast corner of said claim, and thence runs in a southerly direction and with its apex entirely within the surface of said St. Louis Claim until it passes out of the said claim through the said side line and into the Nine Hour Claim at a point about 350 feet northerly from the southeasterly corner of said St. Louis Claim. The dip of this vein is also to the east, the portion thereof the apex of which is within the surface ground of the St. Louis Claim passes on its dip beyond the easterly side line of said claim and under the surface of the said Nine Hour Claim.

"The tunnel above referred to starts at a point on the St. Louis claim westerly of the strike of said last mentioned vein and at a point about midway between the point at which

said vein enters the surface of the St. Louis Claim and the points at which it departs therefrom, and runs toward the said vein, and if extended will intersect said vein at a point thereon which is between perpendicular planes passed through the end lines of the St. Louis Claim (which are parallel) and is also between perpendicular planes parallel to the above-mentioned planes passed through the two points at which said vein intersects the east side of said St. Louis Claim and will not intersect any other vein or lode, before the intersection of the vein above referred to; and that the defendant will not extend said tunnel beyond the point at which it will intersect said vein which apexes within the St. Louis Claim as above mentioned, but proposes and intends to use said cross-cut tunnel in working and mining said vein within the vertical planes last aforesaid on its dip to the full extent of the depth thereof, which constitutes the alleged trespass threatened and intended by said defendants.

VI.

"This stipulation is not intended to, nor shall it in any manner affect the rights of either party, or any of the parties, to any damage or injury they or any of them may sustain or may have sustained on account of any trespass upon said lode claims or any conversion of any quartz rock or ore taken therefrom, and is not intended and shall not limit the rights of either party under the law to any claim for damages, but said stipulation is intended to be, and is limited to the question of the right to an injunction within the planes aforesaid, on account of the extension of said cross-cut tunnel; and this stipulation shall not be considered as evidence of any fact herein stipu-

lated in any other action now pending or which may hereafter be commenced between the parties hereto."

An order was made by the Honorable Hiram Knowles, Judge of the Court, adopting the agreed statement of facts as the findings of fact involved in the cause. (See page 14 of the Record.) And thereafter a final decree perpetually forbidding and restraining the defendant from further prosecuting work on the tunnel mentioned in the complaint, and known as the Transcontinental Tunnel, and from mining and removing any quartz rock or ore belonging to said mining claim by means of said tunnel, or from extending said tunnel further into said claim.

The defendant then appealed to the Circuit Court of Appeals of the Ninth Circuit, which affirmed the decree entered by the District Court. Defendant now appeals to the Supreme Court of the United States.

ASSIGNMENT OF ERRORS.

The Court erred:—

"First—Because it appears from the agreed statement of facts upon which said decree was rendered that the tunnel upon which these defendants are by said decree enjoined from further prosecuting any work was being driven for the purpose of intersecting a portion of a vein of gold-bearing quartz which belongs to the defendant St. Louis Mining and Milling Company of Montana.

"Second—Because it appears from said agreed statement that the said tunnel if extended in the manner intended by these defendants, will intersect the said portion of said vein at

a point therein which belongs to the said St. Louis Mining and Milling Company of Montana.

"Third—Because it appears from said agreed statement that said tunnel, if extended in the manner as intended by said defendants and set forth in said statement, will not intersect any other vein or lode before it intersects that portion of the vein above referred to, and which is the property of the defendant St. Louis Mining and Milling Company of Montana.

"Fourth—Because it appears from said agreed statement of facts that the defendants will not extend said tunnel beyond the point at which it will intersect that portion of the said vein which belongs to the said St. Louis Mining and Milling Company.

"Fifth—Because it appears from said agreed statement of facts that the defendants intend to use said tunnel only in working and mining that portion of the vein mentioned in the pleadings and in said statement, which is the property of the said St. Louis Mining and Milling Company.

"Sixth—Because it appears from the agreed statement of facts herein, and upon which said decree was rendered and entered, that the only trespass which the defendants threaten or intend is the driving of an underground cross-cut tunnel which commenced under the surface of the property belonging to the defendant St. Louis Mining and Milling Company of Montana, and which tunnel defendants intend to continue until it shall intersect a portion of a vein of gold-bearing quartz, which portion of said vein belongs to the St. Louis Mining and Milling Company of Montana, and is underneath the surface ground belonging to the plaintiff, and which said tunnel

said defendants will not extend beyond the point at which it will intersect that portion of the vein referred to, which belongs to the St. Louis Mining and Milling Company of Montana; and which said tunnel so extended will not intersect any other vein than that referred to, and which said tunnel the said defendants intend and propose to use in working that portion of the vein referred to, and which belongs to the said St. Louis Mining and Milling Company of Montana, as appears from the said statement of facts.

"Seventh—Because it appears that said tunnel is being extended and will be extended through what is known as the country rock, not included in plaintiff's grant under its patent, and that said tunnel will in no manner interfere with the surface of any vein, lode or ledge included within said patent, and for that no injury, irreparable or otherwise, will be sustained by the plaintiff.

"Therefore the said defendants and appellants pray that the said decree be reversed, and that this Court be directed to enter a decree dismissing the bill of complaint herein."

ARGUMENT.

We respectfully submit that, for the following reasons, the decree should be reversed:

The facts disclosed by the agreed statement show emphatically that the portion of the vein which the tunnel will intersect has its apex within the boundaries of and runs lengthwise with the side lines of the St. Louis Mining Claim. In fact it will appear that the vein is the same as is found in the case next cited, and the plaintiff in error is the owner thereof

on its dip beyond the side line of the St. Louis claim within the planes referrrd to.

See Montana Mining Company vs. St. Louis M. & M. Co., 102 Fed., 430.

It also appears that the Transcontinental Tunnel is being extended toward this vein, lode or ledge, and is within a few feet of the same, and will penetrate it within the planes described and beneath the surface of the Nine Hour location and patent, and that if permitted to do so appellant company will mine and work the same through said tunnel. It also appears that this vein, lode or ledge will be encountered by the tunnel before any vein, lode or ledge could be reached having its top or apex within the boundaries of the Nine Hour Claim, and the presumption usually indulged that veins, lodes or ledges found beneath the surface of a claim top or apex therein is completely overcome by the facts disclosed in relation to the vein, lode or ledge described in the agreed statement.

There is no allegation in the pleadings that the work done in extending the tunnel through the country rock results in any irreparable injury to the complainant, and there is no allegation that any quartz rock or ore on any vein, lode or ledge apexing in plaintiff's claim has been invaded; on the contrary, it appears from the agreed statement that the tunnel "will not intersect any other vein or lode" before intersecting the vein which has its apex within the surface boundaries of the defendant's mining claim, and that defendant "will not extend said tunnel beyond the point at which it will intersect the vein which apexes within defendant's claim," (p. 13); and

it is not claimed that there will be any interference whatever with the surface of complainant's claim.

The whole scope of the injunction sought to be reversed, therefore, restrains the defendant (plaintiff in error) from continuing the tunnel mentioned and working the lead on its dip to the apex within the surface boundaries of the St. Louis Lode Mining Claim.

The Montana Company, Limited, being the actor and asking the interposition of the equitable jurisdiction of this Court by injunction, we are necessarily led to inquire into the character and extent of the rights acquired by the location and patent of a lode mining claim under the laws of the United States.

We respectfully submit that in so far as the extension of the Transcontinental tunnel is concerned, this injunction should be reversed or so modified as to permit the plaintiff in error to mine and operate through said tunnel all that portion of the vein, lode or ledge apexing inside of the vertical planes referred to in the answer and agreed statement.

We must go to the description of the premises contained in the grant to ascertain what passes by the patent, as this can in no way be enlarged or curtailed by the action of the Land Department in the conveyance of the premises granted. This is especially so in respect to grants by the government, as will be seen by reference to the following authorities:

Slidell vs. Grandjean, 111 U. S., 412, 437.
Heath vs. Wallace, 138 U. S., 548, 585.
Francouer vs. Newhouse, 40 Fed., 618.

The description in the granting clause, Section 2322, Revised Statutes of the United States, is express and unequivocal, and leaves no room for implication, if the doctrine was applicable. The premises GRANTED are "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location."

While the rule is universal that nothing passes under the grant except that which is expressly granted with such incidental rights as are absolutely necessary for its enjoyment, the language of the Statute shuts out all room for implication under the well-established rule of construction. '*Expressio unius est exclusio alterius.*' By expressly declaring that the exclusive right of possession and enjoyment shall be to the surface, and the veins, lodes or ledges having their tops or apexes within the surface boundaries of the claim, it has equally as fully declared that the mass of non-mineral bearing quartz is not included in the grant, except in so far as the same is necessary to the full and complete enjoyment of the surface and veins, lodes or ledges having their tops or apexes inside the boundaries of the claim, according to the calls in the description of the granted premises. Like the high seas upon which the commerce of the world is in a great measure conducted, this barren subterranean region is retained for the COMMON use of the explorer in the more convenient working

of the vein, lode or ledge contained in his grant, and no EXCLUSIVE right of possession and enjoyment thereof is granted to any one. It is reserved to facilitate the practical development and working of the mines of precious metals, and affords to all engaged in such enterprise an easement therein, so that he does not interfere with the granted premises. It creates no underground dividing line between adjoining claimants as to this barren country rock, and establishes no vertical planes except in so far as they are applicable in shutting off the right to the vein in its strike.

Again, the patent cannot include and convey premises not covered by the grant. Congress alone can make primary disposal of the soil, and when the grant is limited to the surface and veins, lodes or ledges having their top or apex inside the surface, the power of the officers of the land department ceases when this is done, and the effect of the patent must be construed accordingly. And so, also, must the provisions of the act be construed *in pari materia*, and if possible made to harmonize. It would be absurd and contradictory to say that the reference to "LAND" in other portions of the act would control the description in the GRANTING clause, which, in express terms limits the word "LANDS" to surface and veins, lodes or ledges having their top or apex within the boundaries of the claim. According to any reasonable rule of interpretation the word "lands" thereafter used means the lands granted, besides it is only the lands granted that can be patented.

If, however, there was any ambiguity as to what was intended to be granted, the eminent propriety of leaving this barren underground region COMMON instead of EXCLUSIVE

property is patent to any one having a fair conception of practical and economical mining.

Indeed, the very purpose of the act was to aid in the development, exploration and sale of the MINERAL LANDS of the government, and the most liberal construction should be given to the law consistent with fundamental rules of interpretation that would best subserve that purpose. Aside from the fact that this mass of non-mineral bearing country rock or material is not included in the grant, it is not only not essential to the enjoyment of the premises granted, but absolutely useless to it except in so far as to afford necessary and proper support, and is usually abandoned after the vein, lode or ledge is worked out and exhausted.

"Besides these unavoidable conclusions reached under the general canon of interpretation of Statutes in such cases, it is manifest that the tunnel of defendant is being constructed for development purposes, and that the right to extend it upon the unappropriated public domain is conceded by section 2323, showing that Congress recognized and appreciated this mode of practically developing and working a quartz mine, and explaining the reason for not including this valueless underground material in the grant, and allowing it to remain public lands for common use instead of private lands for exclusive possession, without any necessity or value for private use or enjoyment except for the purposes mentioned in this section. And so it is Congress never included it in the grant; reserved it as public lands, and has expressly given the right to tunnel through it to one developing a vein or lode, which is exactly the case here. It is true that as to veins discovered

in extending the tunnel the party acquires only such as he would acquire if the discovery was made on the surface, and if the vein, therefore, had its top or apex inside of a legally located or patented claim, the proprietor of the tunnel would acquire no right to it. Yet notwithstanding all this he has the right expressly conferred by the section to "run a tunnel for the development of a vein or lode" in all cases where the government has not parted with the premises involving that right. Indeed the fact that this barren material is not included in the grant, that by the express terms of the act tunnels through it are regarded as expedient and necessary, and provisions allowing them to be made for development purposes, would seem to leave little or no doubt but that Congress had some useful and beneficial object in view in not including it in the grant, and affords a good and sufficient reason why the grant in the patent is confined to the calls in the description of the premises granted. And such was the opinion of the Court in Montana Co. vs. Clark et al., 42 Fed. Rep., 626.

And to the same effect, we claim, is the position of Judge Hallett in the case of the Leadville Mining Co. vs. Fitzgerald, 4 Morrison Mining Report, 380, 384, 385.

In that case the question involved was the right to follow the vein, lode or ledge in its dip into the adjoining claim, the VERY THING GRANTED to the one or the other of the claimants, depending, of course, upon where it had its top or apex. The plaintiff claimed that it originated upon his claim, and there was no question as to the right to tunnel through the non-mineral bearing country rock to develop a vein or lode to which the party projecting the tunnel was entitled, as

is the case here. Yet the guarded language of the learned Judge clearly shows that he had this very distinction in view, and recognized the same throughout the instructions given in the case. This will be observed from the fact that whenever he speaks of the premises granted, he refers to the surface and vein, lode or ledge having its top or apex within the boundaries of the claim. If he was pursuing a vein, lode or ledge under the adjoining claim, his right depended upon where its top or apex existed. This no one doubts. But what does this argue as to a portion of the body of the earth not lying upon the surface or included in any vein, lode or ledge essential to its enjoyment? Here the plaintiff below is the actor, and unless it can show that it has the exclusive right of possession and enjoyment to this portion of the earth not being surface or vein, lode or ledge topping or apexing in its claim or material for the support of either, it is immaterial as to it what others do in tunneling through it to develop a vein, lode or ledge to which the projector of the tunnel is entitled.

The learned Judge, in the case last cited, whenever he has occasion to refer to the exclusive rights of an adjacent owner, limits it to all veins, lodes or ledges that may be found inside his claim, unless it can be shown to top or apex in the claim of another, thereby making the fact that it is found in a claim *prima facie* evidence that it TOPPED or APEXED therein, and adds:

"There is a presumptive ownership of every locator of the territory covered by his location," not as against one running a tunnel through the non-mineral bearing portion thereof, but in so far as relates to the veins, lodes or ledges therein.

The language must be construed with reference to the matter in hand, which involved a presumption for the purposes of preserving a vein, lode or ledge which may or may not have passed under the grant. How different, however, if the projector of the tunnel was constructing it through barren material, unaffecting the surface or any vein, lode or ledge topping or apexing in his ground, but to develop a vein, lode or ledge topping or apexing in the claim of such projector.

It would cease to be a mere matter of presumption as a matter of convenience in determining upon whom devolved the burden of proof, and become one of actual right, and if the party seeking to enforce the extension of the tunnel failed to show HIS EXCLUSIVE RIGHT, he must fail.

So in Iron Silver Mining Company vs. Elgin Mining and Smelting Company, 118 U. S., 196, Sup. C. Rep., 1177, the vein, lode or ledge in question was so located as to confer no extra lateral rights, and the question involved the right to the vein, lode or ledge and mineral therein contained within the surface boundaries of adjacent claims, and in no way involved or elicited an opinion as to the mass of country material beneath the surface, and not contained in any vein, lode or ledge of valuable mineral. Of course, when the grant simply conveys public land within certain prescribed boundaries, as in pre-emption, homestead and placer claims, there could be no question but that what is usually known as a common law right to the granted premises obtains.

If the government has the right to segregate the surface and veins, lodes or ledges from the balance of a claim with defined boundaries, and pass the same by grant, it has cer-

tainly in plain terms done so by Sections 2322 and 2323 *supra.*

Indeed, it may well be said that under the language used in the grant, if between INDIVIDUALS, there is no such ambiguity as would render parol evidence admissible to show that anything else was intended to pass except the surface and veins, lodes or ledges topping or apexing therein, aside from what was necessary for their support and enjoyment. So it is as to the government. It will be conclusively presumed to have granted just what it has in express and unequivocal terms granted, and nothing else. The grant comprises land, and when referred to as land in other parts of the act, it means, and is limited, to the land granted, otherwise we have the tail wagging the dog. This is as true as that an express grant excludes the idea of an implied grant, or that an express warranty excludes an implied warranty, and limits the warranty to that expressly granted. If A should convey to B a piece of land, reserving the exclusive right of possession and enjoyment of the surface and all veins, lodes or ledges having their outcrop or apex therein, and the *tenendum* clause in the deed referred to said lands, could it with propriety be claimed that the grant was thereby enlarged so as to include the reserved premises. It is difficult to understand upon the same process of reasoning why, if A should convey to B the surface and all veins, lodes or ledges having their top or apex therein, how a reference to the LAND conveyed thereafter in the deed could enlarge the grant so as to include something not contained in or necessary to the enjoyment of that which is expressly granted. The principle of construction is equally applicable to the statute, as the statute constitutes what we

may say the grant, and the patent is but evidence of it. If this would be the result as to individuals, it would seem that no good reason could be urged why it should not apply to grants from the government when the property of the public is thereby conveyed. The STATUS of a piece of land with respect to surface and the mines that may exist therein is nothing new to the bench and bar. As a part of our country's history, it is generally known that Montana was a portion of the territory ceded by Spain to France, and embraced in the purchase by the United States from the latter nation. And it has been held by the Supreme Court of the United States in New Orleans vs. United States, 10 Peters, 662, 724, that the laws of Spain were in force. After the acquisition of California, gold was discovered in its boundaries on the 3rd of December, 1849, and the attention of Congress was at once called to the fact by the then Secretary of State, Hon. Thomas Ewing. In his communication he announced that the right to the mines of precious metals, which by the laws of Spain remained in the Crown, was retained by Mexico while she was sovereign of the territory, and had passed by her transfer to the United States; that in the purchase and sale of the soil it was a right which vested in the sovereign, and that it remained with Congress to say whether this right should be retained or passed with the grant of the soil, and it would require an express law to effect the passage of a mining right with such a grant. For a full statement upon this subject we refer to the Public Domain, page 309. In the laws of the Partidas Spain declared that it required an express grant in order to confer the right to hold and use mines, and that such grant from the King ceased at his death. In United States

vs. Castilero, 2 Black, 17, the Supreme Court asserts the doctrine that the right to mines is distinct from the right to land for agricultural or other ordinary purposes existing in the parent country before the independence of Mexico, and that these distinct rights might be vested in the SAME or DIFFERENT persons. And this is the rule of the common law since the time of William the Conqueror, and is imported into and becomes a part of the jurisprudence of this country, as will be seen by reference to First Blackstone Commentaries, 295, and First Greenlief's Cruise, 38. At the time, then, of the exercise by Congress of its constitutional powers in disposing of the public domain by the enactment of the mineral land law of 1866, and its amendments of 1872, a MINING and other right to a piece of public domain might exist as a separate and distinct estate in the same or a different individual. The legislation of Congress upon the subject has certainly not abrogated this doctrine, but on the contrary has given it express recognition by granting to the locator these separate and distinct estates in the same premises. By Section 2322, Revised Statutes of the United States, a grant is made to a locator of the exclusive right of possession and enjoyment of all the surface of the land within the lines of his location, and all veins, lodes or ledges the tops or apexes of which are inside of such surface location, and confers upon him the right to follow such veins or lodes in their course downward laterally inside of the end lines of the location, even though they may so far depart from a perpendicular as to enter beneath the surface location of another. There is, then, the grant of a surface right and mining right in one and the same person

to the same piece of public domain. He is at liberty to sell, or may otherwise lose or dispose of either in any of the modes provided by law. The issuance of the patent to defendant mining company in this case (plaintiff herein), is conclusive evidence of the grant contained in the section of the statute referred to, and is conclusive evidence that the patentee or his grantors had in all respects complied with the law in making the location and securing the EXCLUSIVE RIGHT to the POSSESSION and enjoyment of the surface and VEINS, lodes or ledges included within the lines of its location. This patent is but a confirmation of the grant secured by Section 2322, and cannot be enlarged or curtailed by the ministerial officers of the Land Department in the issuance of a patent for granted premises. These particular estates in a piece of land may be segregated by the owner of the premises, and it would seem unreasonable to suppose that Congress, charged under the Constitution with the power and duty of disposing of the public domain, could not likewise segregate them, in the manner it has done, under the section to which we have referred.

The history of our mining law brings the force of its irresistible testimony to the inevitable conclusion that Congress conveyed, and expressed in the grant, precisely what it intended to convey and express. It is a well-known fact that it was compiled from the customs, rules and regulations of the miners and decisions of the courts which recognized the vein, lode or ledge as the principal thing, and the surface as an appurtenance to it, if land could at all be regarded as appurtenant to land. The vein, lode or ledge with so much surface ground as was necessary and convenient for working

the same, was all that was taken into account. The only distinction now to be made is the grant of the exclusive possession and enjoyment of these, to the locator by the government, thereby conferring a right which he theretofore enjoyed only by sufferance and custom.

Nor is it claimed or pretended that the projection of the tunnel has, or will, interfere with the surface or injure any vein, lode or ledge having its top or apex in complainants' claim. Nor is it claimed or pretended that the construction of the tunnel through this barren rock is doing any irreparable injury, or any injury at all. Hence the only question of any importance is the alleged threat to work quartz rock or ore belonging to complainant, which may in the future be encountered in prosecuting the work upon the tunnel, and that it is agreed the defendants below will not do.

The only rights of the complainant that could be injured would be by reason of the invasion of some lead, lode or ledge having its top or apex inside the boundary lines of its claim, and the extraction and conversion of its quartz rock or ore therein contained, and this, it is agreed in the Statement of Facts, the defendants below will not do.

And such veins in connection with the surface being what is EXPRESSLY granted, and nothing passing under such EXPRESS grant by implication as against the government or individual except that which is necessary to its enjoyment, the mass of the country rock not enumerated or mentioned not passing under the grant, it is reserved to the government, and the government having conceded the right to run tunnels through the same to develop a vein, lode or ledge, and defend-

ants projecting the tunnel for that purpose, have a right to project the same, and a bare threat to trespass upon the property of another cannot work a forfeiture of such right. The law does not visit such results upon the possessor of such a right, and the court will go no further than protect the threatened property—which could easily be done before or after the vein is reached. Hence an injunction prohibiting defendant from working through its tunnel any quartz or ore included in the vein, mentioned in the agreed statement, whether reached or thereafter to be reached by the tunnel, is not warranted by the law applicable to the case at bar.

It MAY BE that should the respondents in projecting their tunnel strike a vein, lode or ledge beneath the surface of the Nine Hour Lode, the presumptions would be that such vein, lode or ledge had its top, or apex, inside the Nine Hour claim. It will be noted, however, that this presumption is entirely overcome by the agreed statement showing that the vein apexes inside the boundaries of the St. Louis Claim, and that lines drawn parallel with the end line at the point of intersection of the apex with the side line will leave the portion of the vein tapped by the tunnel entirely south of where the apex of the vein passes out of the side line of the St. Louis Claim, on the northerly end, and north of the point at which the vein passes out at the southerly end; that is to say, the portion of the vein which will be worked by the tunnel has its apex entirely within the St. Louis Claim, and belongs to said claim, as decided in the case of Montana Mining Co. vs. St. Louis M. & M. Co., 102 Fed., 430.

Recurring again to the provisions of sections 2322 and

2323, in addition to what has been said, why is it that Congress intended to convey by the grant a common law title to a piece of land that it did not simply, as in other cases, describe it by boundaries and leave the matter there? Why did it refer especially in the grant to the surface? Why did it refer particularly to veins, lodes or ledges having their top, or apex, within the lines of the SURFACE location? Why did it not say all veins, lodes or ledges apexing within the CLAIM if the mass of country material, aside from such veins, lodes or ledges passed by this grant? Why does it use the words 'vertical planes,' and then limit it to the vein, lode or ledge in its strike? It is manifest that the only vertical planes applicable to the premises granted is confined to the vein, lode or ledge on its strike, or dip, and that these are to be projected whenever they depart from the surface boundaries on their strike, and that, too, regardless of where they pass out of the side lines of the claim. If Congress had intended to have conveyed what is claimed in Doe vs. Waterloo, it would have contented itself by describing a certain piece of LAND, reserving an easement right to follow the veins, lodes or ledges having their tops or apexes therein, in their downward course into the CLAIM OR LANDS of another. But we find this is not the case; that the grant is limited to certain defined portions of the land in its common law sense, and that vertical planes are of no consequence, except for the purpose of cutting off the vein, lode or ledge on their strike.

If A should enter into an agreement with B by which he would sell to him the SURFACE and certain VEINS, LODES OR LEDGES topping or apexing within such

SURFACE boundaries, and provide that upon the payment to him the sum of five dollars per acre, he would make B a deed for said LANDS, would not the term "land" be limited to the SURFACE and the VEINS, LODES OR LEDGES he had agreed to sell?

Applying these principles to the mining law, which is a conditional grant as well as a law, the term lands would be limited to the surface and veins, lodes and ledges upon said lands, and the veins, lodes or ledges are "the lands" referred to in which mineral deposits are found, and the SURFACE is the LAND for which five dollars per acre is to be paid. And this likewise defines and limits a mining CLAIM OR LOCATION. The rights about which we are speaking are not reserved rights. The question simply is, what rights are conveyed by the grant, and the grantee is not in a situation under such grant to say "hands off" of anything except the granted premises and whatever is indispensable for its enjoyment. This is in accord with the doctrine announced in Freeman, Cotenancy and Partition, Section 435, wherein it is said "that although there cannot be two FEE SIMPLES ABSOLUTE in one and the same land, yet that the mines, ores and minerals BEING LAND, a man may have a fee simple in them as well as he who holds the soil that REMAINS UNCONVEYED may have a fee simple, for they are not the self same lands." We conclude that the mass of country rock and material not described in the grant WAS NOT CONVEYED, and that the United States has conceded the right to tunnel therein for "the purpose of developing a vein or lode," and that defendants when enjoined were exercising that right. The law or grant has only

created a superior right in that which was theretofore held by license under the rules, regulations and customs of miners.

The grant is of the vein, lode or ledge with the surface to enable the convenient working of the minerals contained in them, under the doctrine announced in Canfield vs. Ford, 28 Barbour, 339, and same vs. same, 16 Howard's Practice Report, 483, and the express language of the grant itself. We claim that the doctrine here announced has been established by a recent decision of the Supreme Court of the United States in The Del Monte vs. The Last Chance, 171 U. S., 57. In the Del Monte case the Court reviews the history of the mining laws; and the learned Justice writing the opinion shows clearly that the deed conveys nothing but veins and surface—shows clearly of how great importance is the vein, and also that the only importance of surface is the fact that it is the surface that limits the extent of the vein to which the claimant is entitled.

Speaking of the law of 1866, Justice Brewer, in the opinion referred to, says: "Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area," etc. Again speaking of the same law, and of the patents issued thereunder, he says: "Often they (the patents) were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom."

And the Court further says: "Again, the location upon surface is not made with the view of getting benefit from the

use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth."

In the above argument we have several times stated that it is conceded by the agreed statement of facts that the plaintiffs in error will not use the tunnel referred to for the purpose of extracting any ore belonging to the defendant in error (plaintiff below), which will appear from the agreed statement on Record p. 13, where it is agreed as a matter of fact that the tunnel will not intersect any other vein or lode before the intersection of the vein mentioned in the complaint and the agreed statement of facts (and which belong to the appellants); and that the appellants will not extend the tunnel beyond the point of intersection with the said vein. Inasmuch, then, as our tunnel, which we propose to drive, and which we are enjoined from driving, will not intersect any vein except that which does belong to us, it is quite apparent that there is no endeavor and no thought upon the part of the plaintiffs in error to reach any ore body belonging to the defendant in error. In order to reach any vein belonging to the defendant in error, the appellants would have to drive the tunnel through and beyond the vein, (which it has been decided belongs to us), and the agreed statements of facts shows expressly that the tunnel will not be driven beyond the point which intersects said vein.

For the reasons above stated, we respectfully submit that the decree should be reversed.

E. W. TOOLE,
THOS. C. BACH,
Solicitors and of Counsel for Appellants.

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MAR 7 1904

BRIEF OF APPELLEE.

IN THE

Supreme Court of the United States.

No. 250.

THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, AND WILLIAM MAYGER, APPELLANTS,

vs.

THE MONTANA MINING COMPANY, LIMITED, APPELLEE.

W. E. CULLEN,
Attorney for Appellee.

QUICK PRINT, SPOKANE, WASH.

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BRIEF OF APPELLEE.

STATEMENT.

This case was heard in the court below upon an agreed statement of the case, which the court adopted as its findings of fact. (Record p. 14). The whole case of the appellee is contained in finding number three. In this it is stipulated that the appellants, at the time they were enjoined, were engaged in the construction of their "Transcontinental Tunnel," which, starting on their own ground, the St. Louis Mining Claim, had been driven easterly to the westerly side line of the Nine Hour claim, and thence continued in the same direction fifteen feet further, and under the surface of the appellee's patented mining claim, at a vertical depth of about 260 feet from the surface; that the said tunnel was run horizontally, through *country rock*, and

What would be their respective rights, and by what law should these rights be measured? In case of a conflict, it would be an interesting inquiry, but one not necessary to be made in this case. It would seem as if the only man who would be wholly without right, except as to the surface and outcropping ledges, would be the unfortunate patentee of the claim. At all events he would have no better right to explore his own mining claim than any of his neighbors.

APPELLANTS' CONSOLATION.

Appellants seem to find much comfort in the closing portion of the fifth finding, wherein it is stated that the tunnel will not intercept any other vein or lode before it reaches the ledge they claim belongs to them, and that it is not their intention to extend their tunnel beyond the point where it will intersect this vein. So many references are found in appellant's brief, to these two features of the finding in question, that one would be led to think that counsel regarded them as of controlling importance. They have to confront so many things, in this case, that are discouraging, that it seems hard to deny them a grain of comfort here and there, and yet, when we come to enquire by what right they are tunneling through our mining claim, what difference does it make, whether there are, or are not other leads between the point at which we stopped them, and the point they desire to reach? It is perfectly clear that they have no lead in their tunnel; that in crossing our side line and entering our ground they are not pursuing on its dip, any lead, lode or ledge, having its apex within the surface boundaries of their St. Louis claim. And here we would like to pause long enough to enquire if this single fact is not all that is required to sustain our case. Section 2322 U. S. Rev. Stats. confers upon the owner of a mining claim, the right to follow all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins,

lodes or ledges may so far depart from a perpendicular in their course downward, as to extend outside the verticle side lines of such surface locations. Here, unmistakably and without question, entry into an adjoining mining claim is given, under one condition and in one way. Why, upon the principle of *expressio unius, est exclusio alterius* does not this forbid the entry of a mining claim, at depth, in any other way or manner whatever?

Returning from this digression, to the consideration of appellant's contention, what possible difference could it make upon the question of its right to be where it is with the breast of its tunnel, whether there is, or is not another lode between that point, and the point it desires to reach? Suppose there is no lead between the point it has reached in our ground with its tunnel, and the lead which it claims to own, and says is in there somewhere, does that fact make it any less a trespasser if it has no right to be there at all? On the other hand, suppose there are twenty leads between the two points, does that make it any more a trespasser, or take away altogether, or lessen in any degree its right to tunnel through our ground at its own pleasure?

And so with reference to its intention not to extend its tunnel beyond the point where it will intersect the lead it claims. If I find a man in my wheat field treading down my growing wheat, does it condone the trespass, or render him less a trespasser, because he assures me that he has no intention of pulling up my corn growing in an adjoining field? Besides, under other conditions, the intention of the appellants might change, and if they have the legal right to run their tunnel through fifteen feet of our ground, no intention which they now have, could restrain them from running it fifteen hundred feet through it, if they pleased.

ARGUMENT:

We do not purpose replying at length to the ingenious argument of the learned counsel for the appellant in this

case. The question presented is, by no means, a novel one. It has been passed upon by the Supreme Court of our own state, by several other courts, and we think by this august tribunal. So far, there is no conflict in these decisions, and in them is presented every argument, every suggestion which we could possibly make in support of the decision of the Circuit Court of Montana, in this case. We respectfully call the attention of the Court to

Parrot Sil. & Cop. Co. v. Heinze, 24 Mont. 485.
Maloney v. King, 25 Ibid. 188.
State v. Second Judicial District Court, 25 Id. 504.
Doe v. Waterloo Min. Co., 54 Pac. 935.
Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499.
Cons. Wy. G. M. Co. v. Champion M. Co., 63 Id. 540.
Leadville M. Co. v. Fitzgerald, 15 Fed. Cos. 98.
Duggan v. Davey, 4 Dak. 110.
1 Lindley on Mines, Sec. 551.
1 Snyder on Mines, Sec. 760.

Upon these authorities we respectfully submit this case, begging leave to observe that if these courts are wrong upon this question, and it shall be held by this court, whose decision of this question is ultimate law, that the gentlemen on the other side are right, then is the miner threatened with a new and hitherto unsuspected peril. The doctrine of extra lateral rights, a prominent feature of the Mineral Land Act, has given rise to a perfect flood of expensive litigation. Other provisions of the Act have contributed their quota to the business of the Courts, but it requires no prophet to foretell that if this novel "high seas" idea of the gentlemen on the other side, is to be adopted, and incorporated into the act, it will be the fruitful source of more litigation, and more trouble for the miner, than all the other provisions of the law put together.

W. E. CULLEN,
Attorney for Appellee.

Supreme Court of the United States.

No. 250.—October Term, 1903.

The St. Louis Mining and Milling Company of Montana and William Mayger, Appellants,
vs.
The Montana Mining Company, Limited.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 2, 1904.]

This was a suit brought by the appellee (hereinafter called the Montana Company) against the appellants (hereinafter called the St. Louis Company) in the Circuit Court of the United States for the District of Montana, for an injunction restraining the further prosecution of a tunnel. The facts were agreed upon, and are substantially that the Montana Company was the owner and in possession of the Nine Hour lode mining claim under a patent from the United States on a location made under the mining acts of 1872 and acts amendatory thereof; that the St. Louis Company was the owner of the St. Louis lode mining claim, holding the same under a similar title. In the St. Louis claim is a vein other than the discovery vein, having its apex within the surface limits of the St. Louis claim, but on its dip passing out of the side line of the St. Louis claim into the Nine Hour claim. The tunnel was two hundred and sixty feet underground, running from the St. Louis into the Nine Hour claim and for the purpose of reaching the vein on its descent through the latter. It was run horizontally through country rock, and between the east line of the St. Louis claim and the vein above referred to will not intersect any other vein or lode. The St. Louis Company did not propose to extend the tunnel beyond the point at which it would intersect the vein above referred to, and simply proposed to use this cross-cut tunnel in working and mining said vein. The Circuit Court, upon the facts agreed to, enjoined the further prosecution of the tunnel. That injunction was sustained by the Circuit Court of Appeals for the Ninth Circuit, (113 Fed. Rep. 900; 51 C. C. A. 530,) from whose decision the St. Louis Company has brought the case to this court.

Mr. Justice Brewer delivered the opinion of the Court.

The situation and the question can be easily presented to the mind by considering the significant lines as lines of a right-angled triangle; the vein descending on its dip being the hypothenuse, the tunnel the base line,

and the boundary between the two claims the side line of the triangle. The St. Louis Company, being the owner of the vein, may pursue and appropriate that vein on its course downward, although it extends outside the vertical side lines of its claim and beneath the surface of the Nine Hour lode claim. Such is the plain language of section 2322, R. S., which grants to locators "The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

In other words, it has a right to the hypothenuse of the triangle. May it also occupy and use the base line? Is it, in pursuing and appropriating this vein, confined to work in or upon the vein, or is it at liberty to enter upon and appropriate other portions of the Nine Hour ground in order that it may more conveniently reach and work the vein which it owns? Its contention is that the mining patent conveys title to only the surface of the ground and the veins which go with the claim, and that the balance of the underground territory is open to any one seeking to explore for mineral, or at least may be taken possession of by one other than the owner of the claim for the purpose of conveniently working a vein which belongs to him. The question may be stated in another form: Does the patent for a lode claim take the sub-surface as well as the surface, and is there any other right to disturb the sub-surface than that given to the owner of a vein apexing without its surface but descending on its dip into the sub-surface to pursue and develop that vein?

We are of opinion that the patent conveys the sub-surface as well as the surface, and that, so far as this case discloses, the only limitation on the exclusive title thus conveyed is the right given to pursue a vein which on its dip enters the sub-surface. By section 2319, R. S., "all valuable mineral deposits in lands belonging to the United States" are "open to exploration and purchase, and the lands in which they are found to occupation and purchase." By section 2325 "a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person . . . having claimed and located a piece of land for such purposes . . . shall thereupon be entitled to a patent for the land." In a subsequent part of the same section it is provided that the applicant shall pay five dollars per acre. Appellants rely upon the clause heretofore quoted from section 2322 as a limitation upon the full extent of the grant indicated by these provisions. But this limitation operates only indirectly and by virtue of the grant to another locator to pursue a vein apexing within

his surface boundaries on its dip downward through some side line into the ground embraced within the patent. It withdraws from the grant made by the patent only such veins as others own and have a right to pursue. As said by Lindley (1 Lindley on Mines, 2d ed. section 71):

"In other words, under the old law he located the lode. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex of the vein."

And in vol. 2 (sec. 780):

"*Prima facie*, such a patent confers the right to everything found within vertical planes drawn through the surface boundaries; but these boundaries may be invaded by an outsider lode locator holding the apex of a vein under a regular valid location, in the pursuit of his vein on its downward course underneath the patented surface."

See also *Calhoun Gold Mining Company* v. *Ajax Gold Mining Company*, (182 U. S. 499, 508.) The decisions of the courts in the mining regions are referred to in the opinion of the Court of Appeals in this case, from which we quote:

"This view is in accord with the trend of all the decisions to which our attention has been directed. In *Parrot Silver & Copper Co.* v. *Heinze et al.*, (64 Pac. Rep. 326,) the Supreme Court of Montana held in substance that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: 'Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant.' Of similar import is *State* v. *District Court*, (65 Pac. Rep. 1020.) In *Doe* v. *Mining Co.*, (54 Fed. Rep. 935,) Judge Ross said: 'Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law.' In *Consolidated Wyoming G. M. Co.* v. *Champion Min. Co.*, (63 Fed. Rep. 540,) Judge Hawley said: 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim.'"

The judgment of the Court of Appeals is

Affirmed.